

STATE OF MICHIGAN
COURT OF APPEALS

JODE INVESTMENTS, LLC, CLUB GOLF
PROPERTIES, LLC, and CLUB GOLF
INVESTORS, LLC,

UNPUBLISHED
April 17, 2014

Plaintiffs/Counterdefendants-
Appellees/Cross-Appellants,

v

No. 310957
Macomb Circuit Court
LC No. 2011-000291-CZ

BURNING TREE PROPERTIES, LLC,
BURNING TREE INVESTORS, LLC, SIMONE
MAURO, and SALVATORE DIMERCURIO,

Defendants/Third-Party
Plaintiffs/Counterplaintiffs-
Appellants/Cross-Appellees,

and

SERGIO GESUALE,

Defendant-Appellant/Cross-
Appellee,

and

ANTHONY MARROCCO and ANTHONY
FANELLI,

Third-Party Defendants-
Appellees/Cross-Appellants.

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

JANSEN, P.J. (*concurring*).

I fully concur in the majority's opinion. I write separately to make an additional observation. As the majority alludes, it is unclear whether and to what extent Mauro and DiMercurio should be judicially estopped from proceeding in this matter given their previous bankruptcy filings. See *Spohn v Van Dyke Pub Schools*, 296 Mich App 470, 482-490; 822 NW2d 239 (2012). I note that Counsel acknowledged during oral argument before this Court

that Mauro and DiMercurio had filed for bankruptcy during the pendency of this case. Mauro and DiMercurio had earlier settled with Fifth Third Bank, each agreeing to execute a deficiency note in the amount of \$70,000 to cover their personal guaranties. If Mauro and DiMercurio disclosed the existence of these \$70,000 notes and sought to discharge them in bankruptcy, this would certainly provide evidence that Mauro and DiMercurio were aware of their interest in the personal property of Burning Tree Investors, LLC, as they are claiming in the instant litigation. Because the record before us is devoid of evidence concerning the content of Mauro's and DiMercurio's bankruptcy filings, we cannot determine the applicability of judicial estoppel on appeal. However, it will be necessary for the trial court to address this matter on remand.¹

/s/ Kathleen Jansen

¹ On remand, it will also be necessary for the trial court to determine whether Mauro and DiMercurio, as minority members of the Burning Tree entities, had standing to bring the instant claims on behalf of Burning Tree Properties, LLC and Burning Tree Investors, LLC. See MCL 450.4510.